

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF ILLINOIS)	
)	
Petition for a Certificate of Public Convenience and)	
Necessity, pursuant to Section 8-406.1 of the Illinois)	
Public Utilities Act, and an Order pursuant to Section 8-)	
503 of the Public Utilities Act, to Construct, Operate and)	Docket No. 12-0598
Maintain a New High Voltage Electric Service Line and)	
Related Facilities in the Counties of Adams, Brown,)	
Cass, Champaign, Christian, Clark, Coles, Edgar, Fulton,)	
Macon, Montgomery, Morgan, Moultrie, Pike,)	
Sangamon, Schuyler, Scott and Shelby, Illinois.)	

**AMEREN TRANSMISSION COMPANY OF ILLINOIS' RESPONSE IN OPPOSITION
TO STOP THE POWER LINES COALITION'S MOTION FOR LEAVE TO FILE
SUPPLEMENTAL DIRECT TESTIMONY *INSTANTER***

Over one month after the last date for filing Staff and intervenor testimony, ten days after the deadline for prehearing motions, and one day into the evidentiary hearing, Stop the Power Lines Coalition (“Stop the Power”) has burdened the Commission with a written motion based on misrepresentations and meritless assumptions. It seeks leave to file testimony that is inadmissible on a host of evidentiary grounds. For that reason alone, its motion is futile and should be denied. Stop the Power also asks for what no other intervenor got: the opportunity to file *more* testimony, in violation of the Case Management Plan and without regard to Ameren Transmission Company of Illinois’ (“ATXI”) right to close the evidence. In a thinly veiled attempt to complain about discovery, Stop the Power hopes to influence the Administrative Law Judges’ (“ALJs”) support in its efforts to build its case at this late stage—just days before its “legal expert” witness is slated to take the stand. The ALJs should not be misled. There simply is no justification to all Stop the Power’s discovery “noise.”

The real motive behind Stop the Power’s eleventh-hour motion is clear. Based on hearsay and its interpretation of legal documents and the law, Stop the Power apparently has

concluded a federal floodplain easement is a bar to the Primary Route. But, as ATXI explained in testimony, there is a workaround to the easement and, as explained by ATXI in legal brief in response to the ALJs' related inquiry, there is no absolute legal bar to the Primary Route. Stop the Power's golden goose has been bronzed. Still troubled by the facts and the law, Stop the Power presses on with a desperate (and very late) filing.

ARGUMENT

A. Stop the Power's Motion Is Futile.

The testimony with which Stop the Power seeks to burden the record is inadmissible.¹ Irrelevant evidence is not admissible. Ill. R. Evid. 401, 402. Improper expert opinion testimony, including legal opinion testimony, is not admissible. Ill. R. Evid. 701, 702; *Lid Assocs. v. Dolan*, 324 Ill. App. 3d 1047, 1058 (1st Dist. 2001). Stop the Power's proposed additional testimony contains all of the above, and Stop the Power *concedes* this in paragraph 7 of its motion:

- Lines 37-44, 55-72, 106-08, and 110-12 contain legal conclusions based on Mr. Perry Baird's interpretations of real property records and Illinois law. Stop the Power concedes the testimony interprets the easement deed. (STPL Mtn., ¶ 7.B(2).) In Illinois, an expert may never testify regarding statutory interpretations or legal conclusions. *Lid Assocs.*, 324 Ill. App. 3d at 1058; *Northern Moraine Wastewater Reclamation Dist. v. Ill. Comm. Comm'n*, 392 Ill. App. 3d 542, 573-74 (2d Dist. 2009).
- Lines 55-72 also contain testimony concerning notice to individuals with divided ownership interests in land along the Primary Route based on Mr. Baird's research of county property records. (STPL Mtn., ¶ 7.A.) In fact, the Commission's rules (to the extent they apply) require identification of the "name and address of each owner of record of the land as disclosed by the *records of the tax collector* of the county in which the land is located." 83 Ill. Adm. Code § 200.250(h) (emphasis added). That there may be other ownership interests besides the owner of record is irrelevant, and so is Mr. Baird's testimony. *See* Ill. R. Evid. 401, 402; *see also* 83 Ill. Adm. Code §§ 200.610(a), 200.680 (requiring exclusion of "irrelevant, immaterial [and] unduly repetitious evidence," and permitting the ALJs to exclude irrelevant evidence).

¹ Of note, no party recommends approval of the portion of the Primary Route that is the subject of Stop the Power's proposed testimony. Thus, it is unclear why Stop the Power seeks to burden the record with further testimony in this regard. ATXI only can assume Stop the Power seeks to improperly shore-up a perceived weakness in its case at the last minute.

- Lines 73-105 and 108-110 contain opinion testimony regarding transmission line design and maintenance. (STPL Mtn., ¶ 7.B(1), (2).) Yet Mr. Baird is an attorney specializing in tax and estate planning issues. *See* STPL Ex. 1.1. He is not an engineer, and Stop the Power has offered no evidence that he has the requisite knowledge, skill, experience, training, or education related transmission line design, construction, and maintenance that would qualify him to render those opinions. *See* Ill. R. Evid. 702. Indeed, Mr. Baird *admits* his “knowledge” in this regard is based entirely on internet research. The burden of establishing an expert’s qualifications rests with the party offering the testimony. *Volpe v. IKO Industries, Ltd.*, 327 Ill. App. 3d 567, 576 (1st Dist. 2002). Stop the Power has not met (and cannot meet) that burden here.

Once the above noted lines are removed, what remains of Stop the Power’s proposed testimony are mere introductory statements that serve no purpose standing alone. As such, Stop the Power’s proposed testimony—in its entirety—is inadmissible. To grant its motion would be to allow Stop the Power to file testimony that should be stricken anyway.

B. Stop the Power’s Motion Ignores the Commission’s Rules and the Case Management Plan.

ATXI is the petitioner in this docket and it carries the burden of proof. Accordingly, Rule 200.570 of the Commission’s rules of practice requires that, at hearing, “the petitioner . . . shall open and close.” 83 Ill. Adm. Code § 200.570. As such, the case schedule established by the ALJs allows ATXI to have the last word. (ALJs Notice & Case Management Plan, p. 1 (Jan. 25, 2013) (setting ATXI rebuttal deadline).) The Commission’s rules require the parties to comply with that case schedule. 83 Ill. Adm. Code § 200.660.

Stop the Power’s struthious approach to “compliance” should not be condoned. It wants to file testimony responsive to ATXI’s rebuttal. Read no further than the first page of the proposed testimony, and this point is plain:

Q: What is the purpose for your testimony today?

A: I am describing the research that I performed after reading the testimony of ATXI witness Donnell Murphy I also describe the research that I performed after I reviewed the testimony of ATXI witness Jeffrey V. Hackman

(STPL Ex. 8.0, ll. 8-17.)² Perhaps recognizing the rules and the case schedule do not permit responsive testimony, Stop the Power labels its proposed testimony as “supplemental direct.” But a horse by any other name is still a horse. Given that the last date for Staff and intervenor testimony was April 12, 2013, the proposed testimony unquestionably is improper. *See, e.g. Sprint Comm’cns. L.P.*, Docket 07-0629, Order, (July 30, 2008), p. 23; Tr., pp. 112-13 (Apr. 14, 2008) (ALJs striking “supplemental testimony” filed on the eve of hearing and ostensibly based on discovery responses because it was untimely, prejudicial, and filed outside the case schedule.)

That said, there is still time in the case schedule for cross-examination, and the ATXI witnesses to whom the improper testimony attempts to respond are still available for cross-examination regarding the floodplain easement. If Stop the Power has concerns related to their rebuttal testimony on this point, the hearing room is the place to address them.

C. Stop the Power’s Late Testimony Is a Consequence of Its Own Lack of Diligence.

Stop the Power accuses ATXI of “foot dragging” in discovery. (STPL Mtn., ¶ 1, 6.) The relevant dates, however, are not in dispute. Mr. Hiatt’s October 2012 email (and his related December 5, 2012 eDocket comment) predated Stop the Power’s December 21, 2012 intervention in this case. (*See* STPL Mtn., ¶ 1; STPL Pet. (Dec. 21, 2012).) This means, unequivocally, Stop the Power had knowledge of the flood plain easement. Additionally, ATXI made clear in its direct filing the need to acquire permits, approvals, easements, and the like after the certificate was granted and the route determined. (ATXI Ex. 4.0 (Murphy Dir.), p. 25.) None of this should be news to Stop the Power today. Nevertheless, Stop the Power did not pursue related discovery until three months after its intervention, on the eve of its direct testimony deadline. (*See* Ex. A (Mar. 14, 2013 service email, requesting responses by Mar. 28,

² Stop the Power’s counsel also represented to the ALJs and all present at the close of hearing May 13, 2013 that Stop the Power had filed a motion to submit testimony in response to ATXI’s rebuttal testimony.

2013).) It offers no explanation for its delay in issuing discovery.

ATXI responded to Stop the Power's discovery on March 28. (*See* Ex. B (STPL 5.02S).) Several weeks later, Stop the Power served additional discovery related to the easement. (*See* Ex. C (Apr. 16, 2013 service email, requesting responses by Apr. 23, 2013).) ATXI timely responded to that discovery, and it filed rebuttal testimony related to the easement on April 26, 2013. Yet, again, Stop the Power offers no explanation for its failure to adhere to the ALJs' May 3, 2013 written motions deadline. (ALJs Notice & Case Mgmt. Plan, p. 1 (Jan. 25, 2013).)

Stop the Power could have been more diligent. It was not. The resulting prejudice is plain: Stop the Power's untimely motion has deprived ATXI of any opportunity to conduct discovery related to the late testimony or to respond in written testimony. It has forced ATXI to respond to a futile and meritless motion in the midst of hearing preparations. The Commission should not sanction Stop the Power's dalliance with deviations from its case schedule and rules.

D. Stop the Power's Motion Is Based on a Series of Meritless Assumptions.

Stop the Power asks the ALJs to accept the meritless assumption that ATXI was required to address the floodplain easement in its direct testimony. (STPL Mtn., ¶¶ 5, 8.) Yet, Stop the Power cites no legal authority in support of its motion, let alone any in support of that position. That's because there is none. And here, Stop the Power ignores the simple fact that ATXI did not address the flood plain easement in its direct testimony because there was no need—as stated, the easement presents neither a legal nor engineering bar to the Primary Route.

Stop the Power also claims ATXI “knew” based on statements from a Mr. Hiatt that the floodplain easement “posed a significant obstacle” to ATXI's ability to construct its line. (STPL Mtn., ¶ 1.) Mr. Hiatt is not a party to this proceeding; Stop the Power has not called him as a witness, and he is not available for cross-examination. There is nothing in the record to suggest

Mr. Hiatt is authorized to act on behalf of the NRCS, or any indicia of the truth of his statements. They are hearsay. *See* Ill. R. Evid. 801, 802. That Mr. Hiatt's unreliable hearsay is not part of the evidentiary record is something Stop the Power repeatedly ignores. Also, as explained, ATXI does not consider the easement "a significant obstacle." Here, Stop the Power ignores what *is* part of the evidentiary record.

Stop the Power also contends Mr. Baird "was forced to conduct the requisite research [related to the easement] only after ATXI filed its rebuttal testimony." (STPL Mtn., ¶ 5.) But Mr. Hiatt's hearsay statements predate its intervention in the case. Whatever Mr. Baird was "forced" to do is the result of Stop the Power's failure to exercise diligence, not of any conduct on ATXI's behalf.

Finally, Stop the Power represents that ATXI refused to respond to discovery until threat of a motion to compel. (STPL Mtn., ¶ 6.) That is wrong. ATXI timely responded to the request at issue on April 23, 2013. Counsel for Stop the Power did not raise concerns until an April 30, 2013 letter. Counsel conferred at the earliest opportunity, and ATXI issued a supplemental response. Nevertheless, Stop the Power waited until the evidentiary hearing had commenced to file its futile motion.

WHEREFORE, for the reasons set forth above, ATXI respectfully requests that the Commission deny Stop the Power's futile and untimely motion. Should the Commission grant the motion, ATXI seeks leave, as it would be entitled, to file supplemental rebuttal testimony on Tuesday, May 21, 2013, on the matters limited to Stop the Power's filing, and reserves the right to re-call Mr. Baird for later examination, and for such other and further relief as may be deemed equitable and just.

Dated: May 15, 2013

Respectfully submitted,

Ameren Transmission Company of Illinois

/s/ Albert D. Sturtevant

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on May 15, 2013, I caused a copy of the foregoing *AMEREN TRANSMISSION COMPANY OF ILLINOIS' RESPONSE IN OPPOSITION TO STOP THE POWER LINES COALITION'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL DIRECT TESTIMONY INSTANTER* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0598.

/s/ Albert D. Sturtevant

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